

STATE OF NORTH CAROLINA  
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
22 CVS 4285

RELATION INSURANCE, INC. and  
RELATION INSURANCE  
SERVICES OF NORTH CAROLINA,  
INC.,

Plaintiffs,

v.

PILOT RISK MANAGEMENT  
CONSULTING, LLC; PILOT  
FINANCIAL BROKERAGE, INC.  
d/b/a PILOT BENEFITS; KYLE  
SMYTHE; ROBERT CAPPS;  
LYNETTE KINNEY; EDWARD  
MILES GURLEY; SEAN KELLY;  
TYLER CROOKER; MICHELLE  
LINTHICUM; LINDA MICHELLE  
SNEED; TONI KING; and  
JOHNATHAN LANCASTER,

Defendants.

**ORDER AND OPINION ON  
DEFENDANTS' MOTION TO STRIKE**

THIS MATTER comes before the Court on Defendants' "Motion to Strike Errata Entries to Transcript of Plaintiffs' 30(b)(6) Deponent, Jonathan Cooper" ("Motion to Strike," or "Motion," ECF No. 151). The Court, having considered the Motion, the parties' briefs, the arguments of counsel, the applicable law, and all appropriate matters of record, **CONCLUDES**, in its discretion, that the Motion should be **DENIED** but that Defendants shall be permitted to re-depose Cooper as set forth below.

*Fox Rothschild, by Kip Nelson and Ashley Chandler, for Plaintiffs Relation Insurance, Inc. and Relation Insurance Services of North Carolina, Inc.*

*Rossabi Law PLLC, by Amiel Rossabi, for Defendants Pilot Risk Management Consulting, LLC, Pilot Financial Brokerage, Inc. d/b/a*

*Pilot Benefits, Kyle Smythe, Robert Capps, Lynette Kinney, Edward Miles Gurley, Sean Kelly, Tyler Crooker, Michelle Linthicum, Linda Michelle Sneed, Toni King, and Johnathan Lancaster.*

Davis, Judge.

## **INTRODUCTION**

1. The present Motion asks the Court to determine whether under North Carolina law a deponent is permitted to make substantive changes to his deposition transcript on an errata sheet. The North Carolina Rules of Civil Procedure, as well as prior decisions from this Court interpreting and applying the Rules, mandate an answer in the affirmative to that question. However, the Court is authorized to impose certain safeguards to protect the deposing party in cases where—as here—that party may be otherwise prejudiced by the changed responses on the deponent’s errata sheet.

## **FACTUAL AND PROCEDURAL BACKGROUND**

2. Plaintiffs Relation Insurance, Inc.—formerly known as Ascension Insurance, Inc.—and Relation Insurance Services of North Carolina, Inc. (collectively, “Plaintiffs”) initiated this action on 11 April 2022, asserting multiple claims against (1) certain former employees of Plaintiffs—Edward Miles Gurley, Sean Kelly, Tyler Crooker, Michelle Linthicum, Linda Michelle Sneed, Toni King, and Johnathan Lancaster (collectively, the “Former Employees”); (2) the company for which the Former Employees are now all employed—Pilot Risk Management Consulting, LLC and Pilot Financial Brokerage, Inc. d/b/a Pilot Benefits (collectively, “Pilot”); and (3) the managing members of Pilot—Kyle Smythe, Robert Capps, and Lynette Kinney. (Compl., ECF No. 3.)

3. In order to resolve the discrete issue presented in this Motion, the Court need not recite the facts giving rise to this lawsuit or list the specific claims and counterclaims that have been asserted between the parties. A detailed factual background is contained in the Court's Amended Order on Plaintiffs' Motion for Preliminary Injunction. (ECF No. 116.)

4. Discovery in this case has been contentious, and the parties have brought a number of discovery-related issues to the Court's attention pursuant to Rule 10.9 of the Business Court Rules ("BCR"). The present Motion stems from one of these disputes that was unable to be resolved during the BCR 10.9 process.

5. On 7 September 2022, Defendants issued a Notice of Deposition pursuant to North Carolina Rule of Civil Procedure 30(b)(6) to Plaintiff Relation Insurance Services, Inc. of North Carolina ("Relation"). (Defs.' Br. Supp. Mot. Ex. A ["Notice"], ECF No. 152.1.) The Notice directed Relation to "designate one or more officers, directors, managing agents, or other persons who consent to testify on [Relation]'s behalf as to matters known or reasonably available to the corporation regarding [certain] matters, as set forth" in an exhibit to the Notice. The deposition was scheduled to take place on 3 October 2022. (Notice, at 1–2, 11–16.)

6. Relation designated Jonathan W. Cooper as its corporate representative under Rule 30(b)(6), and Cooper testified in this capacity at the deposition. (Pls.' Br. Opp. Mot. Ex. A ["Cooper Dep. Tr."], ECF No. 159.2.)

7. Subsequently, on 21 November 2022, Defendants' counsel received an errata sheet for Cooper's deposition transcript (the "Errata Sheet"). (Defs.' Br. Supp.

Mot. Ex. C, ECF No. 152.3.) The Errata Sheet contained 76 changes to Cooper's testimony. (Errata Sheet, at 3–8.)

8. Defendants' counsel sent an email to the Court on 19 December 2022 pursuant to BCR 10.9 identifying a number of unresolved discovery disputes. Among these issues was Defendants' complaint that "Plaintiffs submitted an improper 6-page errata sheet in which they changed actual deposition testimony of their 30(b)(6) representative[.]" and that "[t]he errata changes substantially contradict and/or modify sworn deposition testimony, as opposed to correcting only typographical errors or errors in transcription[.]" (Email from Amiel Rossabi, counsel for Defendants, to the Court, via its law clerk and court coordinator, and counsel for Plaintiffs (Dec. 19, 2022 11:40 AM EST) (on file with Court).)

9. The Court held a Webex conference with counsel for all parties on 11 January 2023. At the 11 January conference, the Court authorized Defendants to file a motion to strike the Errata Sheet. (Order on BCR 10.9 Submission, ECF No. 156, at 2.)

10. On 23 January 2023, Defendants filed the present Motion requesting that all changes on the Errata Sheet as to testimony set out on pages 25, 38, 72, 81, 91, 115, 176–77, 179–81, 193–96, 201–02, 205–14, 230, 235, and 250–51 of Cooper's deposition transcript be stricken.

11. Following briefing by the parties, the Court held a hearing on the Motion to Strike via Webex on 9 March 2023. The Motion is now ripe for decision.

## ANALYSIS

12. As noted above, Defendants contend that the changes contained on Cooper's Errata Sheet should be stricken on the ground that they improperly change—and in certain instances actually contradict—the sworn testimony that he gave under oath at his deposition.

13. Plaintiffs, conversely, assert that North Carolina law places no limits on a witness's ability to make changes to his deposition testimony on an errata sheet.

14. The subject of errata sheets is governed by North Carolina Rule of Civil Procedure 30(e), which states as follows:

Submission to deponent; changes; signing. – The sound-and-visual recording, or the transcript of it, if any, the transcript of the sound recording, or the transcript of a deposition taken by stenographic means, shall be submitted to the deponent for examination and shall be reviewed by the deponent, unless such examination and review are waived by the deponent and by the parties. If there are changes *in form or substance*, the deponent shall sign a statement reciting such changes and the reasons given by the deponent for making them. The person administering the oath shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent. The certificate shall then be signed by the deponent, unless the parties by stipulation waive the signing or the deponent is ill or cannot be found or refuses to sign. If the certificate is not signed by the deponent within 30 days of its submission to him, the person before whom the deposition was taken shall sign the certificate and state on the certificate the fact of the waiver or of the illness or absence of the deponent or the fact of the refusal or failure to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though the certificate were signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

N.C. R. Civ. P. 30(e) (emphasis added).

15. As an initial matter, Defendants do not dispute the fact that Cooper’s submission of the Errata Sheet complied with the procedure and time limit set out in Rule 30(e). Instead, Defendants’ concern is with the number of substantive changes set out on the Errata Sheet.

16. Defendants are correct that a number of the proposed changes on the Errata Sheet contradict or substantially modify Cooper’s prior deposition testimony. By way of illustration, consider the following examples<sup>1</sup> of the changes contained on the Errata Sheet:

QUESTION	RESPONSE	ERRATA SHEET
<p>Q. Are there any other bases upon which Relation North Carolina has sued any of the former -- any of the defendants, other than the contracts attached to the complaint?</p>	<p>A. No.</p>	<p>Should be “Yes, as alleged in the Complaint”; misunderstood the question</p>
<p>Q. Is there any other basis pursuant to which Relation North Carolina is contending any lost -- any losses or damages as a result of the actions of defendants?</p> <p>A. Confidential Information.</p> <p>Q. Anything else?</p>	<p>A. Nope.</p>	<p>Should be, “Yes, as alleged in the Complaint”; those are the bases pursuant to which Relation NC is alleging damages</p>

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<sup>1</sup> (Cooper Dep. Tr., at 37:23–38:2, 72:3–9, 179:20–180:3, 181:5–10, 195:16–196:6, 206:8–11, 206:15–16, 207:11–14, 211:11–13, 211:16–25, 212:15–213:6, 229:23–230:3, 235:1–4, 235:20–22, 249:24–250:4; Cooper Errata Sheet, at 255–60.)

<p>Q. And the only reason why -- the only reason you know of why Pilot Risk Management Consulting and Pilot Financial Brokerage has been sued in this lawsuit is because their employees have allegedly taken confidential information and trade secrets from Relation North Carolina and Relation, Inc.; is that right?</p>	<p>A. Yes.</p>	<p>Should be “No, they have been sued for the claims alleged in the Complaint including breach of the settlement agreement and other claims”; I was mistaken and said the wrong thing</p>
<p>Q. Was there anything that wasn't produced that you contend was taken by any of the defendants that is confidential or trade secrets that was not produced?</p>	<p>A. Not to my knowledge.</p>	<p>Should be “Yes, including the evidence that Relation has provided”; I was mistaken and did not have the defendants' documents in front of me</p>
<p>Q. When it says, at page nine, paragraph 34, that Relation has regularly and systematically endeavored to maintain the secrecy and confidentiality of all of its confidential and trade secret information, how have the Relation entities done that?</p> <p>A. We have kept everything password-protected on our system so no one can access that. We have shared information sparingly, so we can't get this</p>	<p>A. No, not that I'm aware of.</p>	<p>Should be “Yes, as explained in the Complaint and the Affidavit of Mike Toran”; I was mistaken</p>

<p>information out in the general public.</p> <p>Q. What do you mean by shared it sparingly?</p> <p>A. We don't send our client list to all of our employees.</p> <p>Q. Is there any other way that you've done that?</p>		
<p>Q. So you don't know that she's done anything wrong, she was just sued to determine whether she's done anything wrong?</p>	<p>A. Right.</p>	<p>Should be "No, she was sued based on the evidence that has been provided"; I was mistaken</p>
<p>Q: Is that correct?</p>	<p>A. Correct.</p>	<p>Should be "No"; I was mistaken</p>
<p>Q. And has all of that been evidenced by what was produced by Ms. King in connection with this lawsuit already?</p>	<p>A. Yes.</p>	<p>Should be "No"; I was mistaken</p>
<p>Q. Have any of the other defendants [i.e., other than Kelly, Lancaster, Gurley, King, Linthicum] committed [tortious interference with prospective economic advantage]?</p>	<p>A. Not that I'm aware of.</p>	<p>Should be "Yes"; I misunderstood the question</p>
<p>Q. [Have] any of the other defendants [(other than Kelly, Lancaster, Gurley, King, Linthicum)]</p>	<p>A. Not that I'm aware of.</p>	<p>Should be "Yes, as alleged in the Complaint"; my answer was wrong</p>



committed unfair and deceptive trade practices?		
Q. [You have only testified that Linthicum, King, Gurley, Kelly, Lancaster, or Crooker committed a breach of contract confidentiality,] And that's it?	A. Correct.	Should be "No"; I was mistaken
Q. Any of the other defendants violated that contract provision?	A. Not to my knowledge.	Should be "Yes"; I was mistaken
Q. So as far as you know, they were not provided all of the information they needed, right?  Mr. Nelson: Objection to form.  Q. Isn't that correct?	A. Correct.	Should be "No"; I misunderstood the question
Q. Would those things that you mentioned be reflected in lost revenue, in the list that you referenced?	A. Yes.	Should be "No"; I misunderstood the question
Q. In these documents, did Relation North Carolina object to defendants' discovery requests?	A. No.	Should be "Yes"; I was mistaken
Q. Page two is exactly where the reference to matters that relate to the	A. Yes.	Should be "No"; I misunderstood the question

allegations contained in the pleadings; so you were wrong when you said that, weren't you?		
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17. Defendants acknowledge that no North Carolina court has held that a witness is barred from making substantive changes to his deposition transcript on an errata sheet. However, Defendants ask this Court to adopt the reasoning of several decisions issued by federal courts interpreting Federal Rule of Civil Procedure 30(e)—including federal courts in North Carolina—that have refused to allow changes on an errata sheet that contradict the witness’s testimony.<sup>2</sup> *See, e.g., Thorp Revocable Tr. v. Ameritas Inv. Corp.*, 57 F. Supp. 3d 508, 518 (E.D.N.C. 2014) (“A change in ‘form’ would include correcting a typographical error or a spelling error. A change in ‘substance’ would include the substantive correction of a court reporter’s transcription (i.e., the witness answers ‘No,’ but the court reporter records ‘Yes’.); *see also Greenway v. Int’l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992) (“A deposition is not a take home examination.”).

18. The federal decisions relied upon by Defendants are not illogical. One can legitimately question the logic of a rule allowing a witness, for example, who has given sworn deposition testimony that the sky is blue from stating on an errata sheet a few weeks later that the sky is instead yellow and that he was “mistaken” in his earlier response. Indeed, a layperson learning of this rule’s existence might well

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<sup>2</sup> Rule 30(e) of the Federal Rules of Civil Procedure similarly permits a deponent to list changes “in form or substance” on an errata sheet. *See Fed. R. Civ. P. 30(e)(1)(B).*

wonder as to the point of allowing deposition testimony in the first place if it can be so easily contradicted a short time later by the deponent himself.

19. Nevertheless, this interpretation of Rule 30(e) has never been adopted by a North Carolina court.<sup>3</sup> In fact, to the contrary, this Court on at least two prior occasions has held that North Carolina Rule 30(e)—by its plain language—places no limits on a deponent’s ability to make substantive changes to his prior deposition testimony on an errata sheet. *See BB&T Boli Plan Tr. v. Mass. Mut. Life Ins. Co.*, 2017 NCBC LEXIS 235, at \*2 (N.C. Super. Ct. Dec. 21, 2017) (“[T]he plain language of Rule 30(e) permits a deponent to change his deposition transcript ‘in form or substance,’ so long as the deponent ‘sign[s] a statement reciting such changes and the reasons given by the deponent for making them.’ N.C. R. Civ. P. 30(e). Although Mr. Marley’s substantive changes here appear to be unusual and extraordinary, the Court concludes that those changes are permitted under a plain reading of Rule 30(e), notwithstanding the position taken by a minority of federal courts that have concluded that substantive changes to a deposition transcript should not be allowed.”); *see also Window World of Baton Rouge, LLC v. Window World, Inc.*, 2018 NCBC LEXIS 79, at \*10 (N.C. Super. Ct. Aug. 2, 2018) (“The plain language of Rule 30(e) permits a deponent to change the deponent’s deposition transcript ‘in form or substance,’ so long as the deponent ‘sign[s] a statement reciting such changes and the reasons . . . for making them.’”).

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<sup>3</sup> It also represents a minority view among federal courts. *See Raytheon Co. v. Indigo Sys. Corp.*, 2009 U.S. Dist. LEXIS 12558, at \*6–7 (E.D. Tex. Feb. 18, 2009).

20. Therefore, the Court **CONCLUDES**—based on existing North Carolina law—that no basis exists to strike Cooper’s Errata Sheet.

21. Nevertheless, this Court in *Window World* recognized the authority of a trial court to provide some measure of relief to the deposing party in such circumstances:

Although the Court is sympathetic to Plaintiffs’ complaints, North Carolina Rule 30(e) is unequivocal.

...  
The Court imposes two safeguards, however, in light of the extensive substantive changes Whitworth has made to her deposition transcript. First, Whitworth’s original answers to the questions posed at her deposition will remain part of the record and may be used for impeachment, as contemplated under the applicable North Carolina Rules of Evidence, or for any other relevant or proper purpose.

...  
In addition, the Court will permit Plaintiffs to re-depose Whitworth, for a period of no more than one hour of on-the-record time and at Defendants’ expense, regarding the changes Whitworth has made to her deposition transcript and the reasons for those changes and to ask reasonable follow-up questions that flow from Whitworth’s answers to these permitted inquiries.

...  
The Court further notes that Plaintiffs may seek to challenge Whitworth’s substantive corrections to the extent Defendants offer those corrections as a basis to advance or defeat summary judgment at a later stage of these proceedings. . . . The Court defers any determination on whether the Court will consider Whitworth’s Errata Sheet changes on any motion for summary judgment that may be filed in this action unless and until that issue is raised in the summary judgment phase of this case.

*Window World*, 2018 NCBC LEXIS 79, at \*12, \*16–18.

22. The Court believes that similar safeguards are appropriate here.

23. First, Defendants shall be permitted to re-depose Cooper for a period of no more than two (2) hours of on-the-record time—at *Plaintiffs’ expense*—with regard to any substantive changes to his prior deposition testimony that are contained on

his Errata Sheet on the pages of his deposition transcript referenced herein. At such time, counsel for Defendants may ask Cooper questions regarding the substantive changes contained on those pages of the Errata Sheet and the reasons for those changes along with any reasonable questions that naturally arise from Cooper's responses.<sup>4</sup>

24. Second, Cooper's original responses to the questions posed by Defendants' counsel at his 3 October deposition shall remain part of the record and may be used for impeachment purposes as provided under the North Carolina Rules of Evidence, or for any other legally permissible purpose.

25. Third, Defendants shall be permitted, if they choose, to seek to challenge Cooper's substantive corrections as contained in his Errata Sheet to the extent that Plaintiffs offer those corrections for the purposes of advancing or defeating summary judgment later in this case.<sup>5</sup>

## CONCLUSION

**THEREFORE**, the Court, in the exercise of its discretion, hereby **DENIES** Defendants' Motion to Strike and **ORDERS** as follows:

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<sup>4</sup> The Court **DIRECTS** the parties to work collegially in scheduling the limited re-deposition of Cooper as authorized herein for a date and time that is mutually convenient both to Cooper and to counsel for all parties and that is within the existing deadline for completion of discovery in this case.

<sup>5</sup> As in *Window World*, the Court "defers any determination on whether the Court will consider [Cooper]'s Errata Sheet changes on any motion for summary judgment that may be filed in this action unless and until that issue is raised in the summary judgment phase of the case." *Window World*, 2018 NCBC LEXIS 79, at \*18.

1. Cooper's Errata Sheet shall not be stricken and shall be appended to his deposition transcript;
2. Cooper's original answers to the questions posed at his deposition will remain part of the record of this case and may be used for impeachment, as contemplated by the applicable North Carolina Rules of Evidence, or for any other legally permissible purpose;
3. Defendants will be permitted to re-depose Cooper, at Defendants' election and at Plaintiffs' expense, for a total period of no more than two (2) hours of on-the-record time, at a date, time, and place mutually convenient to the parties and to Cooper—subject to the deadline for the completion of discovery in this case; and
4. The questions that Defendants' counsel may ask at the re-deposition of Cooper are strictly limited to the substantive changes Cooper made on the signed Errata Sheet for pages 25, 38, 72, 81, 91, 115, 176–77, 179–81, 193–96, 201–02, 205–14, 230, 235, and 250–51 of his deposition transcript, the reasons therefor, and any reasonable follow-up questions that flow from the answers given.

**SO ORDERED**, this the 16th day of March, 2023.

/s/ Mark A. Davis  
Mark A. Davis  
Special Superior Court Judge  
for Complex Business Cases